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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 ALPHA ONE TRANSPORTER, INC.,
13 and AMERICAN HEAVY MOVING
AND RIGGING, INC.,

14 Plaintiffs,

15 vs.

16 PERKINS MOTOR TRANSPORT,
17 INC., d/b/a PERKINS SPECIALIZED
TRANSPORTATION,

18 Defendant and
19 Third-Party Plaintiff,

20 vs.

21 TRAIL KING INDUSTRIES, INC., a
South Dakota Corporation,

22 Third-Party Defendant.

23
24 ALPHA ONE TRANSPORTER, INC.,
and AMERICAN HEAVY MOVING
25 AND RIGGING, INC.,

26 Plaintiffs,

27 vs.
28

Case Nos.
13-cv-2662-H-DHB
13-cv-2663-H-DHB
13-cv-2669-H-DHB

**ORDER DENYING AS MOOT
THIRD-PARTY DEFENDANT
TRAIL KING INDUSTRIES
INC.'S MOTION TO DISMISS
PERKINS MOTOR
TRANSPORT, INC.'S THIRD-
PARTY COMPLAINT FOR
FAILURE TO STATE A
CLAIM**

[Doc. No. 53]

1 GOLDHOFER FAHRZEUGWERK
 2 GMBH & CO., INTERMOUNTAIN
 3 RIGGING AND HEAVY HAUL, and
 4 BARNHART CRANE AND
 5 RIGGING CO.,

Defendants.

6 ALPHA ONE TRANSPORTER, INC.,
 7 and AMERICAN HEAVY MOVING
 8 AND RIGGING, INC.,

Plaintiffs,

vs.

9 BRAGG COMPANIES d/b/a HEAVY
 10 TRANSPORT, INC., and SCHEUERLE
 11 FAHRZEUGFABRIK GMBH,

Defendants.

12 On November 6, 2013, Plaintiffs Alpha One Transporter, Inc. and American
 13 Heavy Moving and Rigging, Inc. ("Alpha One") filed a complaint against Defendant
 14 and Third-Party Plaintiff Perkins Motor Transport, Inc. ("Perkins"). (Doc. No. 1.) On
 15 June 17, 2014, Perkins filed a third-party complaint against Third-Party Defendant
 16 Trail King Industries, Inc. ("Trail King"). On July 30, 2014, Trail King filed a motion
 17 to dismiss Perkins' third-party complaint for failure to state a claim under Federal Rule
 18 of Civil Procedure 12(b)(6). (Doc. No. 53.) On August 29, 2014, Perkins filed an
 19 opposition to the motion to dismiss. (Doc. No. 58.) On September 8, 2014, Trail King
 20 filed its reply. (Doc. No. 60.) On September 9, 2014, the Court submitted the motion
 21 for resolution without oral argument pursuant to its discretion under Local Rule
 22 7.1(d)(1) and vacated the hearing set for September 15, 2014. (Doc. No. 63.)

23 On August 7, 2014, Perkins filed a motion to dismiss Alpha One's complaint
 24 for lack of jurisdiction. (Doc. No. 57.) That motion was fully briefed and the Court
 25 submitted the motion for resolution without oral argument. (Doc. No. 63.) On
 26 September 11, 2014, the Court granted Perkins' motion to dismiss Alpha One's
 27 complaint for lack of jurisdiction and granted Alpha One 30 days leave to amend to
 28 establish jurisdiction. As a result, Trail King's motion to dismiss Perkins' third-party
 complaint is moot. In the interests of judicial economy, the Court explains why the

1 Court would likely grant Trail King's motion to dismiss for failure to state a claim
2 without prejudice.

3 **Background**

4 This action involves three consolidated patent infringement actions brought by
5 Plaintiffs against Defendants for infringing U.S. Patent No. 8,424,897 ("the '897
6 Patent"). The abstract for the asserted patent describes a dual lane, multi-axle transport
7 vehicle for transporting or hauling heavy loads. (See Doc. No 1-2 at 1, '897 Patent,
8 Abstract.) Plaintiffs have not asserted a claim against Trail King. (Doc. No. 39 at
9 ¶23.) Perkins' third-party complaint alleges claims for breach of warranty against
10 infringement, indemnity, and contribution against Trail King for the infringement
11 claims alleged by Alpha One. (Doc. No. 39 at ¶1.)

12 **Discussion**

13 **I. Legal Standard for Rule 12(b)(6) Motion to Dismiss**

14 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the
15 pleadings and allows a court to dismiss a complaint upon a finding that the plaintiff has
16 failed to state a claim upon which relief may be granted. See Navarro v. Block, 250
17 F.3d 729, 732 (9th Cir. 2001).

18 A complaint generally must satisfy the minimal notice pleading requirements of
19 Federal Rule of Civil Procedure 8(a)(2) to evade dismissal under a Rule 12(b)(6)
20 motion. Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) requires that
21 a pleading stating a claim for relief contain "a short and plain statement of the claim
22 showing that the pleader is entitled to relief." Fed R. Civ. P. 8(a)(2). "While a
23 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
24 allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
25 requires more than labels and conclusions, and a formulaic recitation of the elements
26 of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
27 (2007). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of
28 'further factual enhancement,'" and the reviewing court need not accept "legal

conclusions” as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). “Factual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–36 (3d ed. 2004)).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Hartmann v. Cal. Dept. of Corr. & Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013) (quoting Iqbal, 556 U.S. at 678). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

II. The Breach of Warranty Claim

In its third-party complaint, Perkins asserts that Minnesota Statute 336.2-312(3) and South Dakota Codified Law 57A-2-312(3)¹ impose a warranty against patent infringement upon Trail King and that both provisions are subject to a four-year statute of limitations. (Doc. No. 39 at ¶29-30.) In its motion to dismiss, Trail King argues that the warranty claim fails because the warranty extends only to delivery of the goods and the patent-in-suit issued after the delivery of the goods. (Doc. No. 53-1.) Perkins responds that its warranty claim satisfies the pleading standards because it is within the four year statute of limitations. (Doc. No. 58.)

The parties agree that Trail King delivered the goods on February 24, 2011. (Doc. No. 53-1 at 3 and Doc. No. 39 at ¶15.) The parties do not dispute that the patent issued on April 4, 2013. (See Doc. No. 1-2.)

The Minnesota Statute Perkins identifies for an implied warranty against infringement states, in pertinent part: “Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be

¹The parties did not identify the choice of law governing this claim. The Court instructs the parties to identify controlling law in all future briefing.

1 *delivered* free of the rightful claim of any third person by way of infringement or the
 2 like” Minn. Stat. § 336.2-312(3) (emphasis added). The relevant South Dakota
 3 law is identical. S.D. Codified Laws § 57A-2-312(3). Under both laws, “[a] breach of
 4 implied warranty occurs, and the claim accrues ‘when tender of delivery is made.’” See
 5 Highway Sales, Inc. v. Blue Bird Corp., 559 F.3d 782, 789 (8th Cir. 2009) (citing
 6 Minn. Stat. § 336.2-725(2)); accord S.D. Codified Laws § 57A-2-725(2) (“A breach
 7 of warranty occurs when tender of delivery is made.”) Consequently, to maintain a
 8 breach of warranty claim under either of these provisions, the breach must have
 9 occurred at the time of delivery.²

10 To maintain a cause of action for breach of implied warranty based on
 11 infringement, the plaintiff must allege that the goods were subject to a rightful
 12 infringement claim upon delivery of the goods. Phoenix Solutions, Inc. v. Sony Elec.,
 13 Inc., 637 F. Supp. 2d 683, 693 (N.D. Cal. 2009) (applying Cal. Com. Code § 2312(3),
 14 which is identical to both the South Dakota and Minnesota provisions). The third-party
 15 complaint does not allege that the goods were subject to a rightful claim of
 16 infringement upon delivery. (See Doc. No. 39.) Accordingly, Perkins has not alleged
 17 enough facts to show that Trail King sold the goods to Perkins subject to a rightful
 18 claim of infringement at the time of delivery. See Foster Poultry Farms v. Alkar-
 19 Rapidpak-MP Equipment, Inc., No: 1:11-cv-00030-AWI-SMS, 2011 WL 5838214, at
 20 *6-7 (E.D. Cal. Nov. 21, 2011).

21 **III. The Indemnity and Contribution Claims**

22 Perkins’ third-party complaint alleges several indemnity claims and also a claim
 23 for contribution. (Doc. No. 39 at 6-9.) Trail King argues that Perkins’ claims are not
 24 available under federal law. (Doc. No. 53-1.) Perkins responds that its claims are
 25 based on “*state* laws, not federal laws—laws that apply as a result of Perkins and Trail
 26

27 ²Statutes of limitations do not create a cause of action but “establish the period
 28 of time within which a claimant must bring an action.” See Heimeshoff v. Hartford
Life & Acc. Ins. Co., 134 S. Ct. 604, 610 (2013).

King’s contractual relationship.” (Doc. No. 58 at 9.) But Perkins did not provide the Court with the parties’ agreement, instead listing several legal conclusions including that “indemnity is implied by the agreement between Perkins and Trail King” and “Trail King is responsible for any damages or other losses in proportion to its comparative responsibility.” (Doc. No. 58 at 9.) Allegations that are merely legal conclusions are not sufficient to state a claim. Iqbal, 556 U.S. at 663 (“[T]he tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitations of a cause of action’s elements, supported by mere conclusory statements.”).³

The Court need not rule on the indemnity or contribution claims because it dismissed Alpha One’s complaint against Perkins for lack of subject matter jurisdiction and provided Alpha One 30 days leave to amend. Further, the arguments in the motion to dismiss might be more appropriate on a motion for summary judgment supported by a more substantial record.

Should the Court choose to exercise its supplemental jurisdiction over Perkins’ indemnity claims, Perkins must provide additional briefing to explain why implied indemnity exists in this case.

The Court further reserves the right to sever the indemnity action or otherwise dismiss the third-party complaint if it is appropriate.

Conclusion

The Court denies without prejudice Trail King’s motion to dismiss Perkins’ third-party complaint as moot because the Court dismissed Alpha One’s complaint against Perkins for lack of subject matter jurisdiction.

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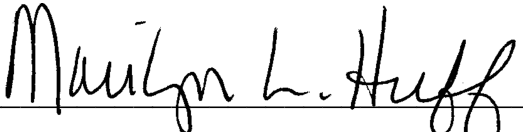
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³State law claims related to patent infringement actions are not universally preempted. Cover v. Hydromatic Packing Co., 83 F.3d 1390, 1393 (Fed. Cir. 1996). But this fact does not release Perkins of its obligation to allege the factual grounds and legal theories supporting its claims for indemnity.

1 For future briefing, the Court instructs the parties to consider the reasoning
2 and instruction of this order.

3 **IT IS SO ORDERED.**

4 DATED: September 11, 2014

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6 MARILYN L. HUFF, District Judge
7 UNITED STATES DISTRICT COURT
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